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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

In re INTERNATIONAL NUTRONICS, INC.,
Debtor.

JEROME ROBERTSON, Chapter 7 Trustee of International Nutronics, Inc.,
Petitioner,

vs.

ISOMEDIX, INC., a Delaware corporation, and RADIATION STERILIZERS, INC., a California corporation, individually and as joint venturers,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

QUESTIONS PRESENTED

Petitioner, a bankruptcy trustee, sought and obtained a final order from the bankruptcy court approving his decision to sell the principal assets of the bankruptcy estate to a fully-disclosed joint venture formed by Respondents for the purpose of bidding on those assets. Petitioner chose not to raise any issues concerning the legality of the joint venture at the time he sought approval of the sale. Almost two years later, Petitioner brought this action as a core proceeding in the bankruptcy court alleging that the joint venture violated the antitrust laws, on the basis of facts that had been fully disclosed to Petitioner at the time

of the sale. Against this background, the Petition presents two questions:

1. Do principles of *res judicata* preclude Petitioner, who sought and obtained a final order approving the sale of property to Respondents, from bringing antitrust claims against Respondents arising from that sale because the claims could have been asserted in the bankruptcy court, even if they were not core claims?

2. Are Petitioner's antitrust claims, which arise from the sale by a bankruptcy trustee of the principal assets of the estate, precluded by *res judicata* because they are core proceedings within the meaning of 28 U.S.C. §157(b)(2)?

Petitioner cannot prevail unless both of those questions are decided in the negative.

STATEMENT OF THE CASE

A. The Case Below.

In June 1987, International Nutronics, Inc., ("INI") filed a Chapter 11 petition in the Bankruptcy Court for the Northern District of California. Petitioner Jerome E. Robertson was appointed trustee of INI in October 1987, and the case was converted to a Chapter 7 liquidation in January 1988.

Shortly after his appointment, Petitioner solicited bids to purchase INI's principal assets. Ultimately, he accepted the bid of a joint venture formed by Respondents Isomedix Inc. ("Isomedix") and Radiation Sterilizers, Inc. ("RSI").[1] On Petitioner's own motion, the bankruptcy court entered an order on March 8, 1988, confirming the sale of assets to the Isomedix-RSI joint venture.

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[1] Isomedix has no parent company and no subsidiaries except wholly-owned subsidiaries. RSI changed its name in March 1992 to SteriGenics International. It has no parent company, but it has two partially-owned subsidiaries, China Biotech Corporation (Taiwan) and Perkassa SteriGenics (Indonesia).

Almost two years later, Petitioner filed this action to challenge the sale. His three claims for relief alleged that the joint venture's bid violated Section 363(n) of the Bankruptcy Code, 11 U.S.C.A. § 363(n) (West 1993), and Sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 1, 2 (West 1993).

Petitioner brought this action as an adversary proceeding in the bankruptcy court, and his complaint specifically alleged that all three of his claims were "core proceedings within the meaning of 28 U.S.C. §157(b)(2) and 157(b)(2)(N)."

In September 1990, the parties stipulated that the reference of the adversary proceeding to the bankruptcy court be withdrawn, and the case was transferred to the district court. Respondents then moved for summary judgment on the grounds that the order Petitioner sought and obtained from the bankruptcy court confirming the sale was *res judicata* as to all claims in the complaint.

The district court granted the motion for summary judgment. It summed up the relevant undisputed facts as follows:

> The joint bid was fully disclosed as such, the Trustee accepted the bid on the advice of counsel, and the sale was approved by the bankruptcy court. No challenge was made to the sale before the bankruptcy court, and no appeal from the order approving sale was taken.

Slip Opinion at 1, reprinted in the Appendix to Petition for Writ of *Certiorari* (the "Petition"). Based on those undisputed facts, the district court held that Petitioner's Bankruptcy Code and Sherman Act claims were barred by *res judicata*.

Petitioner appealed. Initially, the Ninth Circuit affirmed the dismissal of the claim under Bankruptcy Code §363(n), on the grounds that Petitioner had failed to seek relief from the bankruptcy court's sale order within the one-year period provided by Fed. R. Civ. P. 60(b); but it reversed the dismissal of

the antitrust claims, on the grounds that *res judicata* could not apply because such claims, as non-core proceedings, could not have been decided in the bankruptcy court. *Robertson v. Isomedix, Inc.*, 3 F.3d 306 (9th Cir. 1993), *withdrawn and replaced by* 28 F.3d 965 (9th Cir. 1994).

Respondents petitioned the Ninth Circuit for a rehearing of the portion of its ruling that reversed dismissal of the antitrust claims. The Ninth Circuit granted the petition, withdrew its original opinion, and held that the antitrust claims were barred by *res judicata*. *Robertson v. Isomedix, Inc.*, 28 F.3d 965, 969-71 (9th Cir. 1994). Upon rehearing, the Ninth Circuit held that it need not decide whether the antitrust claims were core or non-core proceedings: even assuming them to be non-core, such claims could have been asserted in the bankruptcy court pursuant to 28 U.S.C. §157(c)(1),[2] a procedure that it concluded was "sufficient to satisfy [the requirements] of *res judicata*." Id. at 969.

B. Statement of Facts.[3]

Respondents are engaged in the business of sterilizing medical devices and other products with gamma radiation. They use cobalt-60, a radioactive isotope of the element cobalt, as a source of gamma radiation. INI was engaged in the same business before it went bankrupt, and its assets included partially-decayed cobalt-60 installed at its facilities in Irvine and Palo Alto, California.

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[2] 28 U.S.C. §157(c)(1): "A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected."

[3] The undisputed facts are summarized in the opinion of the Ninth Circuit. 28 F.3d at 967. Record references are provided only for facts not stated in that opinion. "ER" refers to Petitioner's Excerpts of Record filed in the Ninth Circuit. "SER" refers to Respondents' Supplemental Excerpts of Record.

Beginning in November 1987, Petitioner solicited bids for INI's cobalt-60. On November 30, Isomedix submitted a bid for the cobalt-60 located at INI's Irvine facility, but declined to bid on the cobalt in Palo Alto. In December 1987, at Petitioner's request, Isomedix supplemented its bid with an offer to remove the cobalt from INI's Palo Alto facility at the risk and expense of the bankruptcy estate. (SER 8:56-57.) Isomedix explained to Petitioner that it had serious concerns about the risks of radioactive contamination at the Palo Alto facility, and that those risks far outweighed the value of the substantially-decayed cobalt located there. (SER 8:56-57.)

On December 1, 1987, RSI submitted its own, independent bid for the INI cobalt. It offered to purchase the Irvine cobalt at a lower price than Isomedix's bid and offered nothing for the Palo Alto cobalt. Because it had no immediate need for cobalt-60, however, RSI's offer was conditioned on delivery and payment three months later, which reduced the value of its bid. Two weeks later, RSI offered to pay Petitioner 102% of the amount offered by any competing bidder, subject to RSI's prior review and approval of the terms of the competing bid.

During December 1987, Petitioner discussed the bidding with both Respondents. He expressed a desire for an offer to purchase all of INI's cobalt-60 at the earliest possible date. (ER A:5; SER 8:23.)[4]

Following those discussions, on December 30, 1987, Respondents formed a joint venture to submit a bid on all the INI cobalt. On January 6, 1988, they disclosed to Petitioner that they had formed the joint venture, and they submitted a joint bid for all of the INI cobalt. Petitioner rejected the bid, but expressed no objection to the fact that Respondents were bidding as a joint venture. (SER 8:73.)

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[4] For purposes of the summary judgment motion, Isomedix and RSI chose not to contest Robertson's assertion that they knew they were the only bidders.

Petitioner then solicited another round of bids. He did not ask Respondents to bid separately. (SER 8:75-76.) The Isomedix-RSI joint venture increased its bid on January 29, 1988. The joint venture's second bid, like its first, was clearly disclosed, in writing, as a joint bid.

Before Petitioner accepted any bid, his counsel researched the legality of the joint bid by Respondents. (SER 8:38-39.) Then, on February 12, 1988, with full knowledge of the facts and with the advice of counsel, Petitioner unconditionally accepted the joint bid. In his letter accepting the bid, Petitioner, through counsel, represented to Respondents that he would seek judicial approval of the sale "for the benefit and protection of all parties involved." (SER 8:82.)

Even before accepting the bid, on February 5, 1988, Petitioner had filed a motion in the bankruptcy court to confirm the sale to the Isomedix-RSI joint venture. (ER A:7; SER 8:85-93.) That motion made no mention of any alleged illegality in the bidding process and, in fact, attached the second joint bid, fully disclosing itself as such, as an exhibit. (SER 8:90-91.)

On March 7, 1988, Petitioner filed in the bankruptcy court a request for entry of an order confirming the sale, which likewise preserved no legal objection to the joint bid. On March 8, 1988, the bankruptcy court granted Petitioner's request and entered an order confirming the sale to Respondents. Promptly following entry of that order, the joint venture paid Petitioner over $350,000 for the INI cobalt and, at the risk and expense of Respondents, removed the cobalt sources from INI's premises. (SER 8:21-22, 24.)

In April 1988, after the INI cobalt sources were removed and Petitioner had obtained the full benefit of the joint venture's performance, his counsel conducted further research into the possibility of filing the present action. (SER 8:46-47.) Nevertheless, Petitioner did not file suit until January 5, 1990, almost two years after the bankruptcy court sale order.

SUMMARY OF THE ARGUMENT

Petitioner urges the Court to review the decision below and to reverse the dismissal of his antitrust claims, arguing that the bankruptcy sale order was so "ministerial," "routine," and "perfunctory" as to be unworthy of full *res judicata* status. That argument ignores the rule recognized in every circuit that a bankruptcy court order authorizing the sale of property is a final judgment on the merits. It would require this Court to create a new classification of so-called "routine" orders of doubtful finality and effect, which would disrupt settled precedent and practice in the administration of bankruptcy estates.

Although Petitioner asserts that the Ninth Circuit's decision conflicts with precedents in several other circuits, analysis of the cases demonstrates that the Ninth Circuit is in accord with the most recent cases in those circuits.

Finally, for Petitioner to prevail this Court would have to reach and decide an issue on which the Ninth Circuit expressly reserved decision — namely, whether Petitioner's post-petition antitrust claims are core or non-core proceedings — and to adopt a highly restrictive definition of core jurisdiction.

REASONS FOR DENYING THE PETITION

I. PETITIONER'S ARGUMENT IS BASED ON A CLASSIFICATION OF "ROUTINE" BANKRUPTCY COURT SALE ORDERS THAT CONFLICTS WITH SETTLED PRECEDENT AND PRACTICE IN ALL THE CIRCUITS.

Petitioner's disdain for the bankruptcy court's order authorizing the sale of INI's principal assets — an order Petitioner himself obtained, purportedly "for the benefit and protection of all parties involved" — is revealed in the summary of his argument:

> Such orders are a matter of routine and are granted on a *perfunctory* basis. The sole purpose and effect

> of such orders is to dispose of the property for cash, giving the buyer title clear of encumbrances. The idea that there was an opportunity to litigate anything prior to the issuance of the order is a *legal fiction*.

Petition at 5 (emphasis supplied).

Petitioner's position is fundamentally inconsistent with the rule recognized in every circuit that an order issued by a bankruptcy court authorizing or confirming the sale of assets is a "final order."[5]

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[5] *First Circuit: In re Mark Bell Furniture Warehouse, Inc.*, 992 F.2d 7, 8 (1st Cir. 1993) (finality assumed without discussion).

Second Circuit: In re Russo, 762 F.2d 239 (2d Cir. 1985) (finality assumed without discussion).

Third Circuit: In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143, 144 (3rd Cir. 1986).

Fourth Circuit: Willemain v. Kivitz, 764 F.2d 1019 (4th Cir. 1985) (finality assumed without discussion).

Fifth Circuit: Hendrick v. Avent, 891 F.2d 583 (5th Cir. 1990).

Sixth Circuit: Stephens Industries, Inc. v. McClung, 789 F.2d 386, 388 (6th Cir. 1986).

Seventh Circuit: In re Sax, 796 F.2d 994, 996-97 (7th Cir. 1986).

Eight Circuit: In re Bestmann, 720 F.2d 484 (8th Cir. 1983) (assuming finality with respect to order awarding proceeds of sale).

Ninth Circuit: In re Victoria Station, Inc., 840 F.2d 682, 1402-03 (9th Cir. 1988).

Tenth Circuit: In re Bel Air Associates, Ltd., 706 F.2d 301, 304-05 (10th Cir. 1983) (finality assumed without discussion).

Eleventh Circuit: In re The Charter Co., 829 F.2d 1054, 1055 (11th Cir. 1987) (finality assumed without discussion).

D.C. Circuit: In re Magwood, 785 F.2d 1077 (D.C. Cir. 1986) (finality assumed without discussion).

The preclusive effect of final orders has long been recognized in *res judicata* jurisprudence. *Reed v. Allen*, 286 U.S. 191, 198-99 (1932). The parties to such orders cannot debase them simply by pursuing them in a "routine" or "perfunctory" fashion. As the Ninth Circuit pointed out in rejecting Petitioner's argument:

> There is little purpose in the court's confirming a sale if it has no power or duty to determine whether the terms of sale are in the best interests of the estate. Thus, this proceeding confirming the sale was a perfunctory and narrow one only because the Trustee chose not to make it otherwise.

28 F.3d at 970.[6]

Petitioner knew full well that he was accepting, and seeking judicial approval of, a joint bid. His counsel had already investigated the legality of the joint bid at the time Petitioner accepted the bid and sought court approval of the sale. Thus, Petitioner could have raised his claims at the hearing on the order approving sale. Had he chosen to do so, he could have asked the bankruptcy court for conditional approval of the sale, reserving his rights to investigate and pursue whatever claims he believed he had arising from the joint bid. *In re Intermagnetics, Inc.*, 926 F.2d 912, 915-916 (9th Cir. 1991) (conditional order approving sale); *Hendrick v. Avent*, 891 F.2d 583, 584 (5th Cir. 1990) (sale confirmed but special counsel authorized to investigate circumstances of sale).

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[6] See also *Metlyn Realty Corp. v. Esmark*, 763 F.2d 826, 830 (7th Cir. 1985), where the court noted:

> The rule that the final judgment governs the future induces the parties to focus all of their efforts in a single proceeding. If they know that the judgment will establish their rights once and for all, they will bring to bear the information and energies necessary to produce an informed decision. If they believe that they can have a second try, they are more likely to skimp the first time around, and as a result the judicial process will become less accurate.

Petitioner did no such thing. Nor did he return to the bankruptcy court within the one-year period allowed by Fed. R. Civ. P. 60(b)(3) to reopen the order based upon alleged "misconduct of an adverse party."

Having failed to assert his claims at the bankruptcy sale hearing and for almost two years thereafter, Petitioner asks this Court to save him from his own deliberate delay by adopting a rule for so-called "routine" orders that would vitiate the universally-recognized finality of bankruptcy sale orders. Such a rule would disrupt settled practice in the bankruptcy courts and in the administration of bankruptcy estates, and would have serious adverse consequences for both debtors and creditors:

> Unless bankruptcy sales are final when made, rather than subject to being ripped open years later, high prices will not be offered for the assets of bankrupt firms — and the principal losers . . . will be unsecured creditors.

In re Met-L-Wood, 861 F.2d 1012, 1019 (7th Cir. 1988), *cert. denied sub nom. Gekas v. Pipin*, 490 U.S. 1006 (1989).

II. TO THE EXTENT THERE ARE CONFLICTING PRECEDENTS, THEY ARE BEING RESOLVED IN THE CIRCUITS.

Petitioner contends that "the Ninth Circuit is in conflict with the law in the Second, Fifth, Sixth and Seventh Circuits" on the issue of whether a bankruptcy sale order bars subsequent non-core claims. (Petition at 7.) In fact, the Ninth Circuit's decision is supported by cases in each of those circuits, and, to the extent there are inconsistent panel decisions within any of the circuits, such inconsistencies are being resolved within the circuits themselves.

A. The Law in the Sixth Circuit Directly Supports the Decision Below.

The decision below (28 F.3d at 969-70) cites and relies on the opinion of the Sixth Circuit in *Sanders Confectionery Products*,

Inc. v. Heller Financial, Inc., 973 F.2d 474 (6th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 1046 (1993). There, the Sixth Circuit held that lender liability, fraud and RICO claims asserted by parties related to a debtor against a creditor, the creditor's lawyers and the debtor's bankruptcy trustee were precluded by a prior order of the bankruptcy court confirming the debtor's plan of reorganization. A principal issue was whether the bankruptcy court's order was *res judicata* as to both core and non-core claims.

The Sixth Circuit reasoned that:

> While the bankruptcy court could not make a final decision in a non-core proceeding, absent the consent of the parties, it could hear the matter and refer it to the district court. Through its bankruptcy jurisdiction, the district court could decide the claim, allowing for a correct adjustment of the relations between all of the parties.

Sanders Confectionery, 973 F.2d at 483.

Based on that reasoning, the Sixth Circuit concluded that a final order of the bankruptcy court was *res judicata* as to both core and non-core matters. *Id.*[7] Here, the Ninth Circuit adopted the same reasoning to reach the same result. 28 F.3d at 969-70. Thus, the Ninth and Sixth Circuits are not in conflict, but in accord.

B. The Law in the Second Circuit Also Supports the Decision Below.

The decision below (28 F.3d at 970) also relies on the opinion of the Second Circuit in *Sure-Snap Corp. v. State Street*

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[7] By focusing on the plaintiffs' opportunity to *assert* their non-core claims in the bankruptcy court, subject to ultimate *decision* by the district court, the Sixth Circuit's analysis avoids any Constitutional issue under *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

Bank & Trust Co., 948 F.2d 869 (2d Cir. 1991). There, the Second Circuit held that whether or not claims constitute core proceedings "has no bearing on their preclusion" by a final order of a bankruptcy court. 948 F. 2d at 873. That is precisely the holding of the Ninth Circuit as to which Petitioner seeks *certiorari*. Thus, the Second and Ninth Circuits are likewise in accord.[8]

Petitioner finds a "conflict" not in the holding of *Sure-Snap* but in its *dicta*. The Second Circuit held that lender liability claims against certain banks were barred by the order confirming the debtor's plan of reorganization, and observed that the claims would not have been barred by an earlier order of the bankruptcy court that upheld the validity of the banks' liens. 948 F.2d at 874. The court noted that the scope of the earlier proceeding was narrowly focused on the validity of the liens and did not put at issue "the amount of repayment the banks were entitled to." *Id.* That amount was, however, put at issue by the reorganization plan, so the failure to raise lender liability claims at the confirmation hearing precluded the debtor from raising them in later proceedings. *Id.* at 876.

Likewise here, Petitioner's motion to confirm the sale of INI's cobalt to Respondents put at issue whether the joint bid was in the best interests of the estate. As the Ninth Circuit pointed out, "[i]f the joint bid was unduly low because of unlawful collusion . . . [that fact] should have been brought to the attention of the bankruptcy court" at the sale hearing. 28 F.3d at 970. That conclusion is consistent with the Second Circuit's holding in *Sure-Snap* that the debtor should have "raise[d] these [lender liability] claims (if valid)" at the plan confirmation hearing so the court could make a fully-informed "disposition of Sure-Snap's assets or schedule of payments." 948 F.2d at 876.

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[8] Petitioner's implication that the "the Sixth [sic: should be Second] Circuit" characterized the debtor's claims as "non-core" (Petition at 11) is incorrect. The Second Circuit held that whether the debtor's claims were core or non-core was irrelevant to its disposition of the appeal (as did the Ninth Circuit here), and "would in any case have been a question reserved for the bankruptcy judge to determine." 948 F.2d at 873.

C. The Law in the Fifth Circuit is Consistent With the Decision Below.

The Ninth Circuit declined to follow two cases from the Fifth Circuit, *Latham v. Wells Fargo Bank, N.A.*, 896 F.2d 979, 983 (5th Cir. 1990) and *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183 (5th Cir. 1990), insofar as they held "that core proceedings could not be given preclusive effect upon later non-core claims." 28 F.3d at 970. The Ninth Circuit noted, however, that a more recent Fifth Circuit decision, *In re Baudoin*, 981 F.2d 736, 741 (5th Cir. 1993) "casts some doubt on the continuing vitality of the *Latham* rule." *Id.*

In fact, *Latham* and *Howell Hydrocarbons* appear to be anomalies, even in the Fifth Circuit. Earlier decisions in that circuit held that bankruptcy court orders confirming sales of property were *res judicata* with respect to various federal and state law claims arising from or related to the sales. *Hendrick v. Avent*, 891 F.2d 583 (5th Cir. 1990) (RICO, securities fraud and common law claims); *Southmark Properties v. Charles House Corp.*, 742 F.2d 862 (5th Cir. 1984) (common law claims). Those cases did not depend on any analysis of whether the precluded claims were core or non-core; nor did they question the finality and preclusive effect of bankruptcy court sale orders.

Cases decided after *Latham* and *Howell Hydrocarbons* have also minimized the distinction between core and non-core claims in the *res judicata* analysis. In *Eubanks v. F.D.I.C.*, 977 F.2d 166 (5th Cir. 1992) and *In re Howe*, 913 F.2d 1138 (5th Cir. 1990), the Fifth Circuit held that confirmed plans of reorganization precluded subsequent lender liability claims, without even considering whether such claims were core proceedings. Indeed, *Eubanks* cited with approval the decision of the Second Circuit in *Sure-Snap*. 977 F.2d at 171-72.

Most recently, in *In re Baudoin* the Fifth Circuit held that bankruptcy court sale orders were *res judicata* as to subsequent lender liability claims. 981 F.2d at 741-42. The court held that the lender liability claims were core matters, but expressly stated

"we need not decide whether it must be so in order to satisfy . . . our *res judicata* analysis." Id. at 741. In that context, the court specifically limited *Latham* to its facts, stating "[n]or do we read [*Latham*] to hold that bankruptcy jurisdiction must always be core in order to be 'competent' for *res judicata* purposes." Id. at 741, n. 10.

Baudoin also reiterated the Fifth Circuit's previous holdings in *Southmark* and *Hendrick* that bankruptcy sale orders are entitled to full *res judicata* status. 981 F.2d at 742. In doing so, it distinguished *D-1 Enterprises, Inc. v. Commercial State Bank* 864 F.2d 36, 39 (5th Cir. 1989) as dealing with an expedited proceeding to lift a stay, in which lender liability and other "indirect" defenses could not have been asserted.[9] Thus, Petitioner's reliance on *D-1 Enterprises* for the proposition that bankruptcy sale orders are "routine" matters of limited preclusive effect (Petition at 9) misreads *D-1 Enterprises* itself and has been rejected in the very circuit that decided that case.

D. The Law in the Seventh Circuit Can Be Reconciled With the Decision Below.

Three decisions from the Seventh Circuit are relevant.

The first, chronologically, is *In re Met-L-Wood*, where the Seventh Circuit held that a bankruptcy court order confirming the sale of property precluded subsequent RICO and other claims arising from the sale. 861 F.2d at 1016-18. The court acknowledged the *res judicata* effect of the bankruptcy court sale order, *id.* at 1016, and did not consider it necessary to decide whether the claims precluded by that order were core or non-core. Thus, *Met-L-Wood* directly supports the holding of the Ninth Circuit and is appropriately relied on in its opinion. 28 F.3d at 970.

The second relevant decision in the Seventh Circuit is *Barnett v. Stern*, on which Petitioner relies. There, the court held that

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[9] *D-1 Enterprises* itself cited *Southmark* with approval as illustrating the preclusive effect of a bankruptcy court sale order. 864 F.2d at 39.

a bankruptcy trustee's non-core claim against the debtor's son was not precluded by a prior order of the bankruptcy court declaring certain assets property of the estate. The court reasoned that the RICO claim would not have been a core proceeding, and therefore could not have been asserted in the bankruptcy court. 909 F.2d at 978-82. The court appears to have overlooked its own decision to the contrary in *Met-L-Wood*, relying instead on the Fifth Circuit's reasoning in *Howell Hydrocarbons*.

The most recent decision of the Seventh Circuit is *In re Kroner*, 953 F.2d 317 (7th Cir. 1992), where the court held that a bankruptcy trustee's non-core claims *were* barred by a prior order of the bankruptcy court. The court acknowledged its holding in *Barnett* that bankruptcy court orders are generally not *res judicata* with respect to non-core claims, but held that *Barnett* did not apply because the trustee in *Kroner* had filed his non-core claim in the bankruptcy court and thereby consented to that court's jurisdiction. 953 F.2d at 320.[10] *Kroner* expressly limits *Barnett* to a rule that "a bankruptcy court's judgment in a core proceeding . . . has no effect on a party who brings a subsequent non-core action *in the district court*." 953 F.2d at 320 (emphasis supplied).

Thus, the law in the Seventh Circuit, as limited by *Kroner*, supports the decision of the Ninth Circuit in this case. Petitioner commenced this action in the bankruptcy court, thereby consenting to — indeed invoking — its jurisdiction.[11] Accordingly, he is bound by the *res judicata* effect of the bankruptcy court's prior order confirming the sale to Respondents.

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[10] The court also held that the trustee had waived any argument based on *Barnett* by failing to raise it in the courts below. *Id.*

[11] Furthermore, as previously noted, the Trustee pleaded that his antitrust claims were within the bankruptcy court's core jurisdiction.

The fact that the parties agreed to withdraw the reference to the bankruptcy court does not imply that the bankruptcy court lacked jurisdiction, since withdrawal under 28 U.S.C. §157(d) is appropriate whether or not the

(Footnote continued)

E. Inconsistent Panel Decisions are Being Reconciled Within the Circuits and the Ninth Circuit's Decision is Consistent With the Most Recent Holdings in the Other Circuits.

As the foregoing discussion demonstrates, the decision of the Ninth Circuit is entirely consistent with the precedents in the Second and Sixth Circuits. The conflicting precedents in the Fifth and Seventh Circuits have been limited by those courts themselves, and the most recent decisions in the Fifth and Seventh Circuits support the decision of the Ninth Circuit. Therefore, there is no need for this Court to intervene to resolve conflicts in the circuits.

III. PETITIONER CANNOT PREVAIL UNLESS THIS COURT DECIDES THAT HIS POST-PETITION ANTITRUST CLAIMS ARE NOT MATTERS OF "CORE" JURISDICTION, A CONCLUSION NOT REACHED BY THE COURT BELOW AND INCONSISTENT WITH WELL-REASONED PRECEDENTS.

Petitioner's argument depends not only on a debasement of bankruptcy court sale orders, but also on a determination that antitrust claims arising directly from the liquidation of the bankruptcy estate are non-core proceedings. The Ninth Circuit expressly declined to decide whether such claims are core or non-core, holding that they were precluded here in either event by Petitioner's ability to assert them in the bankruptcy court. 28 F.3d at 969.

In order for Petitioner to prevail in this case, however, the Court would have to reach the issue of whether such claims are core or non-core matters, since Petitioner's position depends upon

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bankruptcy court has jurisdiction. See 1 Collier on Bankruptcy 3.01 [2][e] at 3-62 (L.P. King ed., 15th ed. 1993) (citing cases) and *Burger King Corp. v. B-K of Kansas*, 64 B.R. 728, 732 (D. Kan. 1986) ("Section 157(d) does not mention the core/non-core distinction, and withdrawal of reference is not dependent on the classification of a claim.")

a determination that they are non-core. To grant Petitioner any relief, therefore, the Court would have to adopt an extremely narrow view of core jurisdiction that is inconsistent both with well-reasoned precedents and with the position Petitioner himself took in his complaint.

Under section 157(b)(2) of the Bankruptcy Code,

> "[c]ore proceedings include. . ."
>
> (A) matters concerning the administration of the estate; [and]
>
> . . .
>
> (O) other proceedings affecting the liquidation of the assets of the estate. . . ."

28 U.S.C.A. § 157(b)(2) (West 1993).

Petitioner's antitrust claims arise from a post-petition contract made by an officer of the bankruptcy court in the administration (specifically, the liquidation) of the debtor's estate. When claims satisfy those criteria, the courts of appeals have classified them as core matters. *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1400 (2d Cir. 1990), *vacated and remanded on other grounds*, 498 U.S. 964 (1990), *reinstated on remand*, 924 F.2d 36 (2d Cir. 1991); *In re Arnold Print Works, Inc.*, 815 F.2d 165, 168 (1st Cir. 1987).[12]

The First Circuit considered the claim of a debtor-in-possession against a party who had purchased some of its assets but refused to pay the full purchase price. *In re Arnold Print*

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[12] *See also Sanders Confectionery*, in which the Sixth Circuit classified the plaintiffs' claims against most of the defendants as non-core matters, but held that those same claims against the bankruptcy trustee were core proceedings because they "related to his conduct during the . . . bankruptcy." 973 F.2d at 483. The same reasoning would apply here to Petitioner's antitrust claims, which relate directly to his conduct during the bankruptcy.

Works, 815 F.2d at 167 (Breyer, J.). The court characterized the claim as one "that arose out of the administrative activities" (*id.* at 168) of an "'officer[] of the bankruptcy court.'" *Id.* at 170 (quoting *In re Alan Wood Steel* 1 B.R. 167, 169 (E.D. Pa. 1979)). Because of "the matter of timing and the relation to judicial administration of the bankrupt's estate," the court held that the claim was a matter of core jurisdiction. *Id.* at 165-66.

Similarly, in *In re Ben Cooper*, the Second Circuit held that a debtor-in-possession's claim for breach of a casualty insurance contract was a core claim. The debtor had entered into the contract pursuant to its plan of reorganization, and the court reasoned that post-petition contracts with trustees and debtors-in-possession "are integral to the estate administration from the day they are entered into." 896 F.2d at 1399.

Petitioner's reliance on *Barnett v. Stern*, 909 F.2d 973 (7th Cir. 1990) is misplaced. There, the court classified as non-core a RICO claim against the debtor's son based on the son's dissipation of assets that were subsequently declared property of the estate. The RICO claim did not arise from any transaction with the trustee, nor from the trustee's administration of the estate.

Petitioner's argument that "no court has found that antitrust claims are core proceedings" is likewise unavailing. The issue of core jurisdiction depends not on the legal theory of the claim but on the relationship of the claim to the administration of the bankruptcy estate. *In re Arnold Print Works*, 815 F.2d at 169 ("It is the nature of the proceeding – its relation to the basic function of the bankruptcy court – not the state or federal basis for the claim, that makes the difference here.")[13] The antitrust claims arise from the same facts as Petitioner's bid-rigging claim under Bankruptcy Code § 363(n), which is indubitably a core proceeding even under the limited definition espoused by Petitioner

[13] To the extent the absence of authority is of any significance, however, Petitioner has not cited, and Respondents have not found, any case holding that antitrust claims arising from the administration of a bankruptcy estate are *non*-core proceedings.

himself. *See* Petition at 17 (citing *Barnett* for the proposition that a proceeding is core if its invokes a substantive right created by the federal bankruptcy law). It follows that these antitrust claims are core claims because they challenge the sale of estate assets – a "basic function of the bankruptcy court."

The position urged by Petitioner would cause substantial disruption of bankruptcy practice, and would result in increased litigation in the district courts. Debtors-in-possession and trustees have long rested secure in the assumption that bankruptcy courts have core jurisdiction to award them relief in adversary proceedings arising out of such core activities as the sale of estate assets. Petitioner himself made that very assumption when he filed this case in the bankruptcy court, specifically alleging in his complaint that "this matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2) and 157(b)(2)(N)."

Petitioner's admission that the bankruptcy court had core jurisdiction over the antitrust claims was legally correct.[14] Accordingly, the bankruptcy court sale order bars Petitioner's antitrust claims even if Petitioner were correct that only core claims are precluded.

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[14] Since Petitioner's claims arise from a post-petition transaction between Petitioner (in his capacity as trustee) and Respondents, classifying them as core matters is entirely consistent with the Constitutional limits articulated in *Marathon*. A claim based on transacting business with an officer of the court does not implicate private rights. *In re Arnold Print Works*, 815 F.2d at 170.

CONCLUSION

"This Court has long recognized that '[public] policy dictates that there be an end to litigation,'" and that "[t]he doctrine of *res judicata* serves vital public interests" in bringing about that result. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981), *quoting Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931). A writ of *certiorari* in this case would ill serve that policy. Accordingly, and for all the foregoing reasons, the Petition for Writ of *Certiorari* should be denied.

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Respectfully submitted,

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